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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 12, 29, and 52**

**[FAC 2021-02; FAR Case 2018-023; Item VI; Docket No. FAR-2018-0023, Sequence No. 1]**

**RIN 9000-AN81**

**Federal Acquisition Regulation: Taxes—Foreign Contracts in Afghanistan**

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to add two new clauses that notify contractors of requirements relating to Afghanistan taxes or similar charges when contracts are being performed in Afghanistan.

**DATES:** *Effective:* **[Insert date 30 days after date of publication in the *FEDERAL REGISTER*].**

**FOR FURTHER INFORMATION CONTACT:** Mr. Kevin Funk, Procurement Analyst, at 202-357-5805 or [kevin.funk@gsa.gov](mailto:kevin.funk@gsa.gov) for clarification of content. For information pertaining

to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2021-02, FAR Case 2018-023.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published a proposed rule on September 20, 2019, at 84 FR 49502, to add two new clauses that notify contractors of requirements relating to Afghanistan taxes or similar charges when contracts are being performed in Afghanistan. A correction to the proposed rule was published on October 15, 2019, at 84 FR 55109, to correct the regulation identifier number.

Agreements established with the Islamic Republic of Afghanistan exempt the United States Forces and the North Atlantic Treaty Organization (NATO) Forces, and their contractors from liability for Afghanistan taxes and similar charges (e.g. customs, duties, fees).

The Security and Defense Cooperation Agreement (the Agreement) between the Islamic Republic of Afghanistan and the United States of America was signed on September 30, 2014, and entered into force on January 1, 2015. The Agreement exempts the United States Forces from paying any tax or similar charge assessed by the Government of Afghanistan within Afghanistan. The Agreement exempts

United States contractors and subcontractors (other than those that are Afghan legal entities or residents) from paying any tax or similar charges assessed by the Government of Afghanistan within Afghanistan on their activities relating to or on behalf of the United States Forces under a contract or subcontract with or in support of United States Forces. The Agreement also exempts the acquisition, importation, exportation, reexportation, transportation, and use of supplies and services in Afghanistan, by or on behalf of the United States Forces, from any taxes, customs, duties, fees, or similar charges in Afghanistan.

The Status of Forces Agreement (SOFA) between NATO and the Islamic Republic of Afghanistan was issued on September 30, 2014, and entered into force on January 1, 2015. The SOFA exempts NATO Forces (other than those that are Afghan legal entities or residents) from paying any tax or similar charge assessed by the Government of Afghanistan within Afghanistan. The SOFA exempts NATO contractors and subcontractors (other than those that are Afghan legal entities or residents) from paying any tax or similar charge assessed by the Government of Afghanistan within Afghanistan on their activities relating to or on behalf of NATO Forces under a contract or subcontract with or in

support of NATO Forces. The SOFA also exempts the acquisition, importation, exportation, reexportation, transportation, and use of supplies and services in Afghanistan from all Afghan taxes, customs, duties, fees, or similar charges.

This rule adds two new clauses that notify contractors of requirements relating to Afghanistan taxes or similar charges when certain contracts are being performed in Afghanistan. Since both agreements are currently effective for contractors operating in Afghanistan, this rule is only notifying contractors about the exemptions from liability for Afghanistan taxes, customs, duties, fees or similar charges. The rule is not adding any new requirements for contractors, however, it is providing unified guidance for contractors performing in Afghanistan.

No public comments were submitted in response to the proposed rule. However, the rule was updated to clarify that both clauses only exempt taxes or similar charges assessed by the Government of Afghanistan.

## **II. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items**

This rule creates two new clauses: (1) FAR 52.229-13, Taxes-Foreign Contracts in Afghanistan, and (2) FAR 52.229-

14, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement). The objective of the rule is to notify U.S. Government contractors that certain contracts performed in Afghanistan are exempt from payment liability for Afghan taxes, customs, duties, fees or similar charges pursuant to the Agreement and SOFA.

DoD, GSA, and NASA are applying these two clauses to applicable solicitations and contracts below the SAT and to the acquisition of commercial items, including COTS items, as defined at FAR 2.101. This rule clarifies the application of requirements relating to treatment of Afghan taxes, customs, duties, fees or similar charges for contracts performed in Afghanistan. Not applying these clauses to contracts below the SAT and for the acquisition of commercial items, including COTS items, would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule for providing guidance to all applicable contractors. Consequently, DoD, GSA, and NASA are applying the rule to applicable contracts below the SAT and for the acquisition of applicable commercial items, including COTS items.

### **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a significant regulatory action and, therefore, is not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **IV. Executive Order 13771**

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

#### **V. Regulatory Flexibility Act**

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to add two new clauses that notify contractors of requirements relating to Afghanistan taxes, customs, duties, fees, or similar

charges when certain contracts are being performed in Afghanistan.

The Agreement between the Islamic Republic of Afghanistan and the U.S. Government exempts the U.S. Forces, and their contractors and subcontractors (other than those that are Afghan legal entities or residents), from paying any tax or similar charge assessed on activities associated with contracts performed within Afghanistan.

The Status of Forces Agreement (SOFA) between the North Atlantic Treaty Organization (NATO) and the Islamic Republic of Afghanistan exempts NATO Forces and their contractors and subcontractors (other than those that are Afghan legal entities or residents) from paying any tax or similar charge assessed within Afghanistan.

The objective is to notify contractors of both the Agreement and SOFA to clarify how they apply to contracts performed in Afghanistan.

There were no issues raised by the public in response to the Initial Regulatory Flexibility Analysis provided in the proposed rule.

According to data in the Federal Procurement Data System, the Government awarded an annual average of 4,277 contracts for fiscal years 2017 and 2018 with the principal place of performance in Afghanistan to 444 unique contractors annually, of which 488 contracts were awarded annually to 110 unique small businesses (23 percent). There was an average of 488 contracts with the principal place of performance in Afghanistan awarded annually to small businesses in fiscal years 2017 and 2018. There was an average of 3,789 contracts with the principal place of performance in Afghanistan awarded annually to large businesses. The number of potential subcontractors to which the clause would flow down was calculated by using a ratio of 1:3, subcontractors per prime contract (4,277 annual prime contracts). This equates to 1,426 subcontractors, of which DoD, GSA, and NASA estimate that 75 percent would be small entities (i.e., 1,069). The total number of prime contractor and subcontractor small businesses impacted annually is 1,577.

The final rule does not include additional reporting, record keeping requirements, or other compliance requirements.

There are no available alternatives to the final rule to accomplish the desired objective of the statute.

We do not expect this final rule to have a significant economic impact on a substantial number of small entities, because the rule is not implementing any new requirements with which small entities must comply.

Also, small entities will benefit from having one governmentwide clause that identifies the current requirements relating to Afghanistan taxes or similar charges when contracts are being performed in Afghanistan.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

#### **VI. Paperwork Reduction Act**

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Parts 12, 29, and 52**

Government procurement.

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Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 29, and 52 as set forth below:

1. The authority citation for 48 CFR parts 12, 29, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

#### **PART 12—ACQUISITION OF COMMERCIAL ITEMS**

2. Amend section 12.301 by redesignating paragraph (d) (13) as paragraph (d) (15) and adding a new paragraph (d) (13) and paragraph (d) (14) to read as follows:

**12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(d) \* \* \*

(13) Insert the clause at 52.229-13, Taxes—Foreign Contracts in Afghanistan, as prescribed in 29.402-4(a).

(14) Insert the clause at 52.229-14, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), as prescribed in 29.402-4(b).

\* \* \* \* \*

#### **PART 29—TAXES**

3. Add section 29.001 to read as follows:

**29.001 Definitions.**

As used in this part—

*North Atlantic Treaty Organization (NATO) Forces* means the Members of the Force, Members of the Civilian Component, NATO Personnel and all property, equipment, and materiel of NATO, NATO Member States, and Operational Partners present in the territory of Afghanistan.

*U.S. Forces* means the entity comprising the members of the force and of the civilian component, and all property, equipment, and materiel of the United States Armed Forces present in the territory of Afghanistan.

4. Add section 29.402-4 to read as follows:

**29.402-4 Taxes—Foreign Contracts in Afghanistan.**

(a) Use the clause at 52.229-13, Taxes—Foreign Contracts in Afghanistan, in solicitations and contracts with performance in Afghanistan awarded by or on behalf of U.S. Forces, unless the clause at 52.229-14 is used.

(b) Use the clause at 52.229-14, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), instead of the clause at 52.229-13, Taxes—Foreign Contracts in Afghanistan, in solicitations and contracts with performance in Afghanistan awarded on behalf of or in support of the North Atlantic Treaty Organization (NATO),

which are governed by the NATO Status of Forces Agreement (SOFA).

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

5. Add sections 52.229-13 and 52.229-14 to read as follows:

**52.229-13 Taxes—Foreign Contracts in Afghanistan.**

As prescribed in 29.402-4(a), use the following clause:

TAXES—FOREIGN CONTRACTS IN AFGHANISTAN ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])

(a) *Definition.* *U.S. Forces*, as used in this clause, means the entity comprising the members of the force and of the civilian component, and all property, equipment, and materiel of the United States Armed Forces present in the territory of Afghanistan.

(b) *Tax exemption.* This acquisition is covered by the Security and Defense Cooperation Agreement (the Agreement) between the Islamic Republic of Afghanistan (Afghanistan) and the United States of America signed on September 30, 2014, and entered into force on January 1, 2015.

(1) The Agreement exempts the United States Government, and its contractors and subcontractors (other than those that are Afghan legal entities or residents),

from paying any tax or similar charge assessed by the Government of Afghanistan on activities associated with this contract within Afghanistan if the activities are on behalf of or in support of U.S. Forces. The Agreement also exempts the acquisition, importation, exportation, reexportation, transportation, and use of supplies and services in Afghanistan, on behalf of or in support of U.S. Forces, from any taxes, customs, duties, fees, or similar charges imposed by the Government of Afghanistan.

(2) The Contractor shall exclude any Afghan taxes, customs, duties, fees, or similar charges from the contract price, other than those charged to Afghan legal entities or residents.

(3) The Agreement does not exempt Afghan employees of Government contractors and subcontractors from Afghan tax laws. To the extent required by Afghan law, the Contractor shall withhold tax from the wages of these employees and remit those payments to the appropriate Afghan taxing authority. These withholdings are an individual's liability, not a tax against the Contractor.

(c) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts, including subcontracts for commercial items.

(End of clause)

**52.229-14 Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement) .**

As prescribed in 29.402-4(b), use the following clause:

TAXES—FOREIGN CONTRACTS IN AFGHANISTAN (NORTH ATLANTIC TREATY ORGANIZATION STATUS OF FORCES AGREEMENT) ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])

(a) *Definition.* North Atlantic Treaty Organization (NATO) Forces, as used in this clause, means the Members of the Force, Members of the Civilian Component, NATO Personnel and all property, equipment, and materiel of NATO, NATO Member States, and Operational Partners present in the territory of Afghanistan.

(b) *Tax exemption.* This acquisition is covered by the Status of Forces Agreement (SOFA) entered into between NATO and the Islamic Republic of Afghanistan (Afghanistan) issued on September 30, 2014, and entered into force on January 1, 2015.

(1) The SOFA exempts NATO Forces and its contractors and subcontractors (other than those that are Afghan legal entities or residents) from paying any tax or similar charge assessed by the Government of Afghanistan within Afghanistan if the activities are on behalf of or in

support of NATO Forces. The SOFA also exempts the acquisition, importation, exportation, reexportation, transportation, and use of supplies and services in Afghanistan on behalf of or in support of NATO Forces from all Afghan taxes, customs, duties, fees, or similar charges.

(2) The Contractor shall exclude any Afghan taxes, customs, duties, fees or similar charges from the contract price, other than those charged to Afghan legal entities or residents.

(3) Afghan citizens employed by NATO contractors and subcontractors are subject to Afghan tax laws. To the extent required by Afghan law, the Contractor shall withhold tax from the wages of these employees and remit those withholdings to the appropriate Afghan taxing authority. These withholdings are an individual's liability, not a tax against the Contractor.

(c) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts including subcontracts for commercial items.

(End of clause)